Supreme Court of the United States

OCTOBER TERM 1945

MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE AND CABLE COMPANY and UNITED STATES OF AMERICA,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

Upon bring a private suit under the False Claims Statute, the relator acquires, *by operation of law*, a property right in the cause of action which is immune from governmental interference.

1. The *qui tam* action was "well known in England, whence we imported it;" *Sutherland* v. *Int'l Ins. Co.*, 43 F. 2d 969, at 970 (C. C. A. 2, 1930); see *Marvin* v. *Trout*, 199 U. S. 212, at 225 (1905). Resort to the English authorities is, therefore, appropriate. They establish that the relator acquires a vested right upon commencement of suit.

Year Book 1 Henry VII, folio 3 a (Mich. T., Plea 2 [1485]), reports:

> "Quand cesti qui voit suir ad un fois son action commence, or est l'action sien, et nemy popularis: car par

> son suit commence il ad fait accion populer estrange son propre accion, le quel le Roy, ne nul autre poit relesser quant a son interest, et le condemnation et le acquital le party a son suit est barre a touts gens, et encontre le Roy, et uncore le Roy en touts ceux cases devant ascun accion commence par estranger, poit celle pardonner et relesser, et ce sera barre encontre touts gens. Quod Nota bene: car ce divisite fuit granted, et denie par nulluy." *

It is thus the commencement of action, not the recovery of judgment, which vests one-half of the cause of action in the *qui tam* plaintiff. Once the action is begun, not even the Sovereign can impair the rights of the relator.

The Year Book rule has been consistently followed in England; *Stretton* v. *Tayler,* Cro. Eliz. 138, 78 Eng. Rep. 395; *Hammon* v. *Griffith,* Cro. Eliz. 583, 78 Eng. Rep. 826; *Dr. Foster's Case,* 11 Coke 65 b, note, 77 Eng. Rep. 1235, note.

It is reaffirmed in 3 *Coke Inst.* 238:

> "After an action popular be brought, *tam pro domino rege, quam pro se ipso,* according to any statute, the king cannot discharge but his own part, and cannot discharge the informer's part, because by the bringing of the action he hath an interest therein; but before action brought, the king may discharge the whole * * *."

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* "Once the person who desires to sue (in a popular, or *qui tam* action) has commenced his action, the action is his and it is no longer a popular action; for by bringing his suit he has rendered his own the (theretofore) strange popular action, and neither the King nor anyone else can release it so far as his interest is concerned; judgment for or against the defendant in his action is a bar against the whole world and even the King; but in all those cases in which a stranger has not yet commenced an action, the King can forgive and release the claim and that will constitute a bar against all the world. And note this well: for this distinction was granted, and it was denied by no one." (Parenthetical interpolations added.)

The 18th century authorities are to the same effect:

4 *Blackstone, Commentaries,* 399:

> "Neither, lastly can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty."

Accord:

> *Bacon's Abridgment, verbo "Pardon" (B);*
> *Hawkins, Pleas of the Crown,* bk. 2, ch. 26, sec. 64 (7th Ed., 1795).

The same rule is sustained by the authority of Lord Mansfield. In *Couch* v. *Jefferies,* 4 Burr. 2460, 98 Eng. Rep. 290 (1769), a *qui tam* action had been brought to recover a penalty. After verdict for plaintiff, but *before judgment entered,* an Act of Parliament remitted the penalty. Defendant's motion to set the verdict aside was denied:

> "Here is a right vested; and it is not to be imagined that the Legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions. Otherwise, it would be punishing the innocent instead of the guilty. It can never be the true construction of this Act; to take away this vested right and punish the innocent pursuer of it with costs."

The decision turned upon an interpretation of the statute; but it held that the right of the *qui tam* plaintiff, even before judgment, is "vested".

2. These authorities are controlling here. In framing the False Claims Statute, Congress did not purport to chart an unknown course. Even the language of the statute: "as well for himself as for the United States" (R. S.,

§3491), is an almost literal adaptation of the *"tam pro domino rege quam pro se ipso"* of English usage. By following the English phraseology Congress manifested its intent to adopt the legal incidents of the English *qui tam* action.* Hence it is well understood that the private suit authorized by the False Claims Statute is the exact equivalent to, and successor of, the English *qui tam* action; *U. S.* v. *Griswold,* Fed. Cas. No. 15,266 (D. C. Ore., 1877); see *Pollock* v. *Steamboat Laura,* 5 Fed. 133, at 136 (D. C., S. D. N. Y., 1880).

The "vested right" which, under the English authorities, the relator acquires in the cause of action upon bringing suit thereon, has therefore been recognized in this country. In *U. S.* v. *Griswold,* 24 Fed. 361 (D. C. Ore., 1885), aff'd 30 Fed. 762 (C. C. Ore., 1887), a relator, suing under the False Claims Statute, had recovered judgment of more than $23,000. Before anything was collected, the Government purported to release the claim for $100. The court refused to give effect to the release:

> *"By virtue of the statute* prescribing the forfeiture and damages recovered in this case, and authorizing any one to sue for them who would, *the defendant, Griswold, became bound to pay the same to the prosecutor herein, the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect,* and the judgment obtained *thereon* is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, any more than if it had been obtained in a private action on the bond of the defendant. 3 Bl. Comm. 159. For, although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, *he could not, by this or any other means known to the law, interfere with its prosecution after it was commenced,* or release or dis-

* Story, J., held in *Pennock* v. *Dialogue,* 2 Pet. (27 U. S.) 1, at 18 (1829), that "where English statutes—such, for instance, as the statute of frauds, and the statute of limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority."

pose of the prosecutor's interest in the judgment therein. 6 Bac. Abr. 134; 4 Bl. Comm. 399; Whart. Crim. Pl., §528; 1 Bish. Crim. Law, §§909, 911; *U. S.* v. *Lancaster,* 4 Wash. C. C. 64; *Shoop* v. *Com.,* 3 Pa. St. 126; *U. S.* v. *Harris,* 1 Abb. (U. S.) 110; *Ex parte Garland,* 4 Wall. 381; 2 Hawk. P. C. c. 37, §§34, 54." (24 Fed., at 364; italics added)

It is true that the relator in the *Griswold* case had recovered judgment; but the court did not view this fact as material. The bringing of suit was held to control; in this the court followed Blackstone whom it cited.

Another outgrowth of the same doctrine is the rule that commencement of a *qui tam* action precludes later suit on the same cause by anyone else. Such was the law in England, *Hutchinson* v. *Thomas,* 2 Lev. 141, 83 Eng. Rep. 488; *Jackson* v. *Gisling,* Str. 1169, 93 Eng. Rep. 1105; *Combe* v. *Pitt,* 3 Burr. 1423, 97 Eng. Rep. 907; and such it is here, *U. S.* v. *Anaconda Wire & Cable Co.,* 52 F. Supp. 824 (D. C., E. D. Pa., 1943); *U. S. ex rel. Benjamin* v. *Hendrick,* 52 F. Supp. 60 (D. C., S. D. N. Y., 1943). For the purpose of this rule "the United States stands • • • just as does 'any person' ", *U. S.* v. *Dwight Mfg. Co.,* 213 Fed. 522, at 524 (D. C. Mass., 1914). Hence, "whichever—the informer or the district attorney—first commences an action for a particular violation of the statute, thereby excludes the other from so doing", *U. S.* v. *Griswold, supra,* Fed. Cas. No. 15,266; *Commonwealth* v. *Howard,* 13 Mass. 221, at 222 (1816); *State* v. *Bishop,* 7 Conn. 181, at 185 (1828); *Hawkins, P. C., supra.*•

Indeed, so strong is the vested right of the relator in a *qui tam* action first commenced, that even a judgment dismissing on the merits a second suit, brought by another on the same cause, does not bar the further prosecution of the first; *Beadleston* v. *Sprague,* 6 Johns. (N. Y.) 101 (1810).

• That the contrary decision in *U. S.* v. *Baker-Lockwood Mfg. Co.,* 138 F. 2d 48, at 51-53 (C. C. A. 8, 1943), rev'd on other grounds *sub nom. Nathanson* v. *U. S.,* 321 U. S. 746, is questionable was recognized by the Court below (R. 61).

3. The "vested right" in the cause of action against Anaconda which petitioner thus acquired upon bringing this suit, could not validly be taken by Congress. It is elementary that "a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference"; *Pritchard* v. *Norton*, 106 U. S. 124, at 132 (1882). This Court has recognized "the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed"; *Graham* v. *Goodcell*, 282 U. S. 409, at 426 (1931). This is as true under the Fifth Amendment, *Graham* v. *Goodcell, supra; Osborn* v. *Nicholson*, 13 Wall. (80 U. S.) 654, at 662 (1872), as it is under the Fourteenth, *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338 (1922); *Ettor* v. *Tacoma*, 228 U. S. 148, at 155-6 (1913), and under the "great and fundamental principle of a republican government", *Wilkinson* v. *Leland*, 2 Pet. (27 U. S.) 627, at 657-8 (1829).

When Anaconda presented its fraudulent demand to the United States and collected thereon, it became immediately obligated to pay the statutory forfeiture and damages. And when petitioner started this suit, one-half of this amount became due to him. Under the "general rule" of *Graham* v. *Goodcell, supra*, the 1943 amendment of the False Claims Statute could not deprive him of that right.

4. Respondents argued below that, before judgment, petitioner's right is not "vested" because he is "entitled to receive" his moiety only upon "prosecuting it (the suit) to final judgment", R. S., §3493. But this language only indicates that the proceeds of the litigation cannot be divided before they are recovered. Before judgment and collection the Government is just as unable as petitioner to receive any part of the recovery; yet its right is certainly "vested" rather than "inchoate". As was said in *Robison* v. *Beall*, 26 Ga. 17, at 47 (1858):

"The penalty is 'to be sued for', 'on the application of an informer'. Of course, then, the right to *sue* for the penalty and, by the suit, to recover the penalty, is to vest in the informer. True, the Act says that the money, 'when recovered', is to be paid, one-half to the State, and the other half to the informer; but this is not saying that the right to these halves, respectively, is not to vest before the recovery. The time when money is to be paid is no test of the time when the right to the money vests. *Debitum in presenti, solvendum in futuro,* is a common case. Suppose this penalty paid after suit, but before recovery, would not the informer be entitled to one-half of it? Surely he would."

5. Respondents also claimed that this suit is for a "penalty" which, until judgment, may be defeated by the repeal of the penalty statute; *Norris* v. *Crocker,* 13 How. (54 U. S.) 429, at 440 (1851); *Pope* v. *Lewis,* 4 Ala. 487 (1842). But this rule, assuming it to be applicable to *qui tam* actions, does not aid respondents. In the first place, the False Claims Statute is not a "penalty" law. Double damages, such as those allowed by R. S., §3490, are no penalty; see *Overnight Motor Transp. Co.* v. *Missel,* 316 U. S. 572, at 583-4 (1942). The "device of double damages plus a specific sum" in the False Claims Statute was chosen to make the Government whole, not to punish the wrongdoer, *U. S. ex rel. Marcus* v. *Hess,* 317 U. S. 537, at 551-2 (1943). A right to "damages" is property and is protected by the Constitution, even before judgment has been recovered thereon, *Angle* v. *Chicago etc. R. Co.,* 151 U. S. 1, at 19 (1894); and this is true even where the right to damages is created by statute, *Ettor* v. *Tacoma,* 228 U. S. 148 (1913).

Secondly, even if this were a penalty suit, the 1943 amendment did not "repeal" the penalty, but reconveyed it to the Government. The Court below recognized (R. 61) that the rule of *Norris* v. *Crocker, supra,* applicable only to *repeals,* does not support such *reconveyance.* A penalty suit falls with the *repeal* of the statute* because of "the

* But see R. S., §13, 1 U. S. C., §29.

injustice of punishing a man for an act which the law no longer considers a crime", *Bank of St. Mary's* v. *Georgia*, 12 Ga. 475, at 482 (1853). In the present case the "penal" policy of the United States has not changed; Anaconda is still liable for forfeitures and double damages. What did change is the Government's willingness to share the recovery with petitioner. But such change of mind is not authorized by any precedent. Even an attempt by Congress to *release* an informer's share in a penalty, while retaining the Government's own share, has been condemned, *M'Lane* v. *U. S.*, 6 Pet. (31 U. S.) 404, at 426-8 (1832); the Government's *appropriation* of petitioner's share must fail *a fortiori*.

POINT II

Petitioner also has a *contract* right against the United States to prosecute this suit to judgment and to collect his share of the recovery.

If it were assumed, for argument, that the pre-1943 False Claims Statute should be construed *in vacuo*, without regard to the precedents in England and in this country, petitioner would still have a contract right inviolable under the Constitution.

1. If a private party were to invite another, in terms comparable to those of the False Claims Statute, to bring an action on his behalf, the institution of such suit would create a binding contract. Suppose that A, a victim of fraud, says to B: "You may bring an action upon my claim, as well for yourself as for me; if you do, you shall bear all costs and you shall not discontinue without my written consent; if you recover judgment, one-half of all amounts collected is yours." If B responds by bringing the action, a contract results which A cannot lawfully repudiate.

It is true that B has earned his share only if he succeeds and collects. But the formation of a valid contract

is not postponed until then. For B, by bringing the suit, agrees not to discontinue it and to bear the costs. A binding contract arises therefore at once; and the procurement of a judgment is merely the performance of B's undertaking, but not a condition for the formation of the contract. *Williston, Contracts* (Rev. Ed., 1936), Vol I, §60, p. 166; *Restatement, Contracts,* §31; *Wood* v. *Duff-Gordon,* 222 N. Y. 88, at 91 (1917).*

Nor is the legal effect of A's offer changed if it is addressed to the public at large. "General offers" are well recognized; *Restatement, Contracts,* §28; *Williston, supra,* §32, pp. 77 *et seq.* The contract is made with the first person accepting the offer, *Williston, supra,* p. 78.

2. The legal implications of the transaction are the same if A is the Government of the United States, speaking through a statute.

> "It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state * * *" (12 Am. Jur., Const. L., §406, p. 37, citing cases).

In determining the presence of a contract the language of the statute is entitled to "practical, common-sense construction", *Russell* v. *Sebastian,* 233 U. S. 195, at 205 (1914).

The False Claims Statute employs language which, if used by a private party, would amount to the offer of a contract. That the offer was made in the solemn form of a statute duly enacted by Congress does not render it any less obligatory. The offer, like that of a private

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* Even if A's offer were only for a "unilateral contract" and hence could be "accepted" only by full performance on the part of B, the offer would become irrevocable when B, by commencing suit, incurs labor, expense and liability for costs; *Restatement, Contracts,* §§45, 90; *Williston, supra,* §60A, p. 170.

party, can be accepted and made irrevocable by bringing suit.

Russell v. *Sebastian, supra,* 233 U. S. 195, illustrates the rule. The California Constitution had authorized "any individual or any company" to lay gas or water pipes in the public streets of any city having no public water or gas works (p. 198). Despite "the generality of the provision with respect to all persons and cities", it was held to constitute the offer by the state of a contract (p. 203); the commencement of the laying of pipes by a company constituted "acceptance in fact" (p. 203), since the company had thereby "changed its position beyond recall" (p. 208); and the resulting contract (p. 204) was held to survive the repeal of the constitutional provision. Even after the repeal the company was held to have the contract right further to expand its system (p. 208). For since it could not discontinue its services and was, in fact, obligated to meet all reasonable requirements of the community, it had the "correlative" "right to serve", including the "privilege to install the means of service" (pp. 208-9).

The False Claims Statute was similarly addressed to "any person" (R. S., §3491). Institution of suit by petitioner constituted "acceptance in fact" of the statutory offer; for it involved petitioner in expense, labor and liability for costs (R. S., §3493), thereby "changing his position beyond recall." And since petitioner is obligated not to discontinue (R. S., §3491), he must have the "correlative right" to prosecute his suit to judgment and collection.

3. Other considerations forcefully support the contractual character of the relation. The False Claims Statute is not just a law dictated by public policy and the general good. The Government, if defrauded, is in a position little different from that of a private claimant. It has a monetary interest of its own. By inviting another to sue on its behalf and to split the proceeds, it descends from its pedestal as lawmaker to the arena of the bar-

gaining individuals. "You sue for me, and you shall have half of the recovery": This is the language and the proper subject-matter of contract, even if embodied in a statute.

4. It is true that Judge Clark, in his concurring opinion below (R. 62), could "see no contract in any real sense between the relator and the sovereign, only a method of law-enforcement by private individuals under the stimulus of a reward for successful accomplishment, but with nothing to prevent the sovereign from resuming enforcement itself before the reward has been earned".

But this reasoning would seem less than convincing. To say that there is "no contract in any real sense" falls short of showing why there is not. And to say that the statute provides a "method of law-enforcement" is not inconsistent with the existence of a contract made for that very purpose. But Judge Clark's opinion steps on really dangerous ground in holding that the reward, although held out as a "stimulus" to invite action, may be withdrawn at any time before it is "earned". Such a rule would make the statute a trap and a snare for those who trustingly, upon the Government's invitation, incur expense, labor and liability for costs, only to find themselves ultimately ousted by the Government's "resuming enforcement itself." To find that Congress sanctioned a rule of so immoral operation would require clearer support in the statute than its language affords. And it need hardly be added that Judge Clark's opinion does not touch our primary contention that, regardless of any contract, petitioner has by operation of law a vested property right in the cause of action (*supra*, Point I).

5. If petitioner has a contract right against the United States, the Fifth Amendment protects it against Governmental interference, whether by Congress or by the Executive; *Lynch* v. *U. S.*, 292 U. S. 571, at 579 (1934):

> "Rights against the United States arising out of a contract with it are protected by the Fifth Amend-

ment. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Accord: *Perry* v. *U. S.*, 294 U. S. 330, at 350-3 (1935).

6. But respondents contended below that petitioner's contract right, if any, was at most an agency and could be terminated by the Government at its will, subject only to petitioner's right to damages or *quantum meruit; Restatement, Agency,* §§118, 455. Respondents deduced that petitioner, whatever his rights against the Government, can no longer prosecute this action.

But petitioner is not the Government's agent. An agent is "a person authorized by another to act on his account and under his control"; *Restatement, Agency,* §1, Comment (d). Under the False Claims Statute petitioner acted neither on account of the Government nor under its control. The statute expressly provided that petitioner was to sue "as well for himself as for the United States", R. S., §3491. To the extent that he sued "for himself", he acted for his own account. Nor was petitioner under the Government's control; for under the False Claims Statute the relator has the "sole control" of his suit, except upon discontinuance; *Bush* v. *U. S.*, 13 Fed. 625, at 629 (C. C., Ore., 1882); *U. S.* v. *Griswold,* Fed. Cas. No. 15266(D. C., Ore., 1877); letter of the Attorney General of July 31, 1943, *Cong. Rec., supra,* p. 7612, col. 1. The absence of the two essential elements thus negates an agency relation. The facts that the Government is not a party to the action, *Winne* v. *Snow,* 19 Fed. 507 at 508 (D. C., S. D. N. Y., 1884), and that petitioner cannot recoup his expenses from the Government, R. S., §§3491, 3493, fortify this conclusion.

Petitioner, we submit, is the assignee *ex lege* of the Government's claim, subject to a trust of one-half in favor of the Government; *Caswell* v. *Allen,* 10 Johns. (N. Y.) 118 (1813). The major distinctions between trust and agency

are the trustee's title to the trust property, his freedom from control by the *cestui* and his inability to subject the beneficiary to personal liability; *Restatement, Trusts,* §8, Comments (a), (b) and (c). All of the salient features of the False Claims Statute—petitioner's "property in his part of the penalty" (4 *Blackstone Comm.* 399), his "sole control" of the litigation, his position as the sole party plaintiff, his right to recover and collect the statutory damages, forfeiture and costs, his inability to subject the Government to liability for costs—compel the conclusion that, upon commencement of suit, the cause of action is transferred to him, one-half in his own right, the other half in trust for the Government.

But if the relation should be agency, it is coupled with an interest and therefore irrevocable; *Hunt* v. *Rousmanier,* 8 Wheat. (21 U. S.) 174 (1823). The very reasons militating for an assignment indicate at least that the relator "by the bringing of the action hath an *interest* therein" (3 *Coke Inst.* 238) sufficient to render the power irrevocable; *Restatement, Agency,* §§138, 139; and compare Illustrations 1 and 2 of §138.

POINT III

Denial of federal jurisdiction by the 1943 amendment of the False Claims Statute is tantamount to the destruction of petitioner's right itself.

The 1943 amendment purports to affect only the jurisdiction of the district courts which Congress has undisputed power to regulate, Constitution, Art. III, §1; *Lockerty* v. *Phillips,* 319 U. S. 182, at 187-8 (1943). But if petitioner cannot sue in the district courts he cannot sue anywhere. R. S., §3490, provides that the "forfeiture and damages shall be sued for in the same suit". And with respect to "all suits for penalties and forfeitures incurred under the laws of the United States", federal jurisdiction is "exclusive of the courts of the several States";

§256 (2) of the Judicial Code, 28 U. S. C., §371 (2). The abolition of the jurisdiction of the district courts by the 1943 amendment thus leaves petitioner altogether without remedy.

Petitioner's vested right, protected as it is by the Fifth Amendment, cannot be taken by indirection through the complete destruction of the remedy. This is true under the contract clause of the Constitution; *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, at 60 (1935); *Richmond M. & L. Co.* v. *Wachovia B. & T. Co.*, 300 U. S. 124, at 128-9 (1937). It is equally true under the due process clauses of the Fourteenth Amendment, *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673, at 679 (1930); *Ettor* v. *Tacoma*, 228 U. S. 148, at 155-6 (1913), and of the Fifth Amendment, *Graham* v. *Goodcell*, 282 U. S. 409, at 430-1 (1931).

POINT IV

The 1943 amendment of the False Claims Statute cannot be sustained on the ground that petitioner may sue for compensation in the Court of Claims.

The Court below assumed, without deciding, that petitioner had a vested right in the cause of action against Anaconda, and that the 1943 amendment effected a "taking" of that right. But the Court held that the taking was not without due process of law. For by its power of eminent domain Congress could, under the Fifth Amendment, take petitioner's property for just compensation. The compensation did not have to be paid in advance of the taking, provided that petitioner was afforded a plain and adequate remedy; *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, at 21 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, at 104 (1932). According to the Circuit Court petitioner was given such a remedy; for by taking his property the Government impliedly contracted to pay him just compensation; *U. S.* v. *Lynah*, 188 U. S. 445, at 462, 464, 465 (1903);

and §145 (1) of the Judicial Code, 28 U. S. C., §250,* permits petitioner to enforce the implied contract in the Court of Claims (R. 62).

We submit that the Circuit Court erred on two counts.

A

Congress made no contract to compensate petitioner for the taking of his property

Under the Court of Claims Act, 28 U. S. C., §250 (1), as under the similar Tucker Act, 28 U. S. C., §41 (20), petitioner can sue the United States for compensation only if his claim arises upon a "contract, express or implied, with the Government of the United States". In the absence of a contract the United States is immune from suit, even though petitioner's claim for the taking of his property be "founded upon the Constitution" or be one "for damages, liquidated or unliquidated"; *Schillinger* v. *U. S.*, 155 U. S. 162, at 168-71 (1894); *Basso* v. *U. S.*, 239 U. S. 602 (1916).

To sue the United States in the Court of Claims petitioner would have to rely upon "the contract implied in fact which, in view of the constitutional obligation justly to compensate for property taken by eminent domain, ordinarily arises on a taking of private property by the government pursuant to law"; *Marion & Rye V. R. Co.* v. *U. S.*, 270 U. S. 280, at 283 (1926). But the Government, as will presently be seen, made no implied contract with

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* That section, as far as pertinent, provides:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: Provided, * * *."

petitioner to pay him compensation for the taking of his property.

1. Not every governmental taking of property raises the implied contract to pay compensation. The conditions are stated in *U. S.* v. *Lynah, supra,* 188 U. S., at 465:

> "Whenever in the exercise of its governmental rights (the Government) takes *property the ownership of which it concedes to be in an individual,* it impliedly promises to pay therefor." (Italics supplied.)

The language here italicized reflects law well settled; *Alabama* v. *U. S.,* 282 U. S. 502, at 507 (1931); *U. S.* v. *North American Transp. & Trad. Co.,* 253 U. S. 330, at 333 (1920); *U. S.* v. *Great Falls Mfg. Co.,* 112 U. S. 645, at 656 (1884). The rule was clearly stated in *Tempel* v. *U. S.,* 248 U. S. 121, at 130 (1918):

> "But in the case at bar both the pleadings and the facts found precluded the implication of a promise to pay. For the property applied for the public use is not and was not conceded to be in the plaintiff. • • • The law cannot imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker Act affords no remedy."

The rule is founded in common sense. Where the Government concedes that the property taken belongs to another, it may be presumed to act under its power of eminent domain; and that power may constitutionally be exercised only upon payment of "just compensation". But the requirement of just compensation is inapplicable where the Government predicates its action on some other right or power. To imply in such case a contract to compensate would be the barest fiction, would impute to the Government an intent to expropriate where it does not even know that it is taking private property, and would

in effect nullify the statutory limitations of the jurisdiction of the Court of Claims.

2. Here not even the Court below "conceded" that petitioner had any property right; much less did Congress. The Committee Reports and the voluminous Congressional debates (*supra*, p. 5) suggest not the faintest awareness of Congress, much less a "concession", that the relators in the suits then pending had vested rights. No constitutional question was ever raised. Congress, it may be inferred, simply assumed that its right to regulate the jurisdiction of the district courts (Constitution, Art. III, §1) sustained the amendment. Such was also the position of the Attorney General who sponsored the amendment; witness the briefs submitted by his office in this case, which deny that petitioner has any vested or property right in the claim against Anaconda. On this theory Congress would indeed have been free to terminate all pending actions, without need to fall back on its power of eminent domain.

To sue in the Court of Claims petitioner would have to plead and prove affirmatively that Congress, when enacting the 1943 amendment, "conceded" that he had a vested right; *Pearson* v. *U. S.*, 267 U. S. 423, at 427 (1925). But from the known facts no such "concession" by Congress can be gathered. Congress intended to eliminate what it thought was merely a hope or expectation of reward. If it turns out that petitioner had a vested or property right, the Government cannot be made a condemnor thereof *in invitum*. The taking of petitioner's property is ineffective because it violates due process of law; and it cannot be cured by invoking the right of eminent domain which Congress did not intend to exercise and the price of which it did not intend to pay.

3. This conclusion is sustained by additional grounds. The contract upon which suit may be brought in the Court of Claims "must be an actual one and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law"; *Alabama* v. *U. S.*, *supra*, 282 U. S., at 506.

"The circumstances", it has been held, "may be such as to clearly rebut the existence of an implied contract"; *Klebe* v. *U. S.*, 263 U. S. 188, at 191 (1923); *Atwater & Co.* v. *U. S.*, 275 U. S. 188, at 191 (1927). More particularly, the implication of a contract will be deemed rebutted where the Government, upon taking the property, states that it will not pay therefor; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46, at 57 (1919); *Mullen Benev. Co.* v. *U. S.*, 290 U. S. 89, at 95 (1933).

The 1943 amendment of the False Claims Statute was designed to eliminate or reduce the compensation of the *qui tam* plaintiffs. Those who, like petitioner, brought their suits without original information are to receive nothing. Congress so provided by terminating their suits (R. S., §3491C, as amended) and repealing R. S., §3493. An enactment designed to take compensation away cannot be construed as an implied promise to pay it nevertheless.

B

Even if Congress had contracted to compensate petitioner, the taking of his property was invalid since it was not "for public use"

Assuming, for argument's sake, that Congress, in terminating this action, promised to compensate petitioner, the attempted exercise of eminent domain must fail because petitioner's property was not taken *for public use*. That a taking for private use is unauthorized, even though compensation be provided, appears from the clear language of the Fifth Amendment and is well settled; *Missouri Pac. R. Co.* v. *Nebraska*, 164 U. S. 403, at 416-7 (1896); *U. S.* v. *Certain Lands*, 78 F. 2d 684, at 686 (C. C. A. 6, 1935), cert. dism. 297 U. S. 726. And it is equally well settled that "the nature of a use, whether public or private, is ultimately a judicial question"; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, at 705 (1923).

If the 1943 amendment of the False Claims Statute were permitted to stand, petitioner's share would flow into the general treasury of the United States. While it would

thus become public property, it would not be put to a "public use" within the meaning of the Fifth Amendment. The sole purpose and effect of appropriating private property into the public treasury would be to enrich the treasury. But that is the function of taxation. The mere enrichment of the treasury can never justify the exercise of eminent domain; nor can it be accomplished by this power; for whatever would flow by this means into the treasury would have to be paid out again as "just compensation". The "public use" envisaged by the Fifth Amendment must be a use for a specific and well defined purpose. Otherwise every taking of private property could be sustained on the mere ground that the Government is the recipient; and the limitations which the words "for public use" place upon the power of eminent domain would go into the discard.

It might be said that the 1943 amendment was designed not only to put the relators' shares in pending *qui tam* actions in the public treasury, but also to prevent overzealous informers from embarrassing criminal proceedings brought by the Government (*Cong. Rec.*, 78th Cong., 1st Sess., p. 7572; *Sen. Rep.* No. 291, Part 1). But the prevention of an existing abuse is no substitute for the constitutional requirement that the property taken by eminent domain must be designed for "public use". It is the character of the use to which the property is to be put after its taking which must determine whether or not it was taken for public use. This does not mean that Congress was powerless to prevent the mischievous interference by private suits with criminal prosecutions. But the means was to place appropriate procedural curbs upon those suits (such as a stay until termination of the criminal suits); the chose in action itself could not be taken away under any of the powers conferred upon Congress by the Constitution.

Respectfully submitted,

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